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No. 94-688

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

NATIONAL PRIVATE TRUCK COUNCIL, INC., WESTINGHOUSE ELECTRIC CORPORATION, and ROY E. GRIFFIS,

Petitioners,

v.

OKLAHOMA TAX COMMISSION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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Respondents' various arguments in opposition to the petition for a writ of certiorari are insubstantial.

1. Respondents try to claim that there is no conflict among lower courts on the question presented by the petition by citing only decisions in accord with the decision below and by simply ignoring the twelve decisions cited at page 12 of the petition that reached the opposite conclusion.[1] Br. in Opp. at 6, 10-14. Only one of those decisions, Bloomingdale's By Mail v. Huddleston, 848 S.W.2d 52 (Tenn. 1992), *cert. denied*, __ U.S. ___, 113 S.Ct. 3002 (1993), is even mentioned by respon-

[1] Another recent decision recognizing a right of action under § 1983 in state tax cases has come to petitioners' attention since the petition was filed. *Bielski v. Zorn*, 627 N.E.2d 880 (Ind. Tax Ct. 1994).

dents, in a footnote in which respondents implicitly acknowledge the conflict by characterizing the decision of the Supreme Court of Tennessee as "inexplicable.' Br. in Opp. at 12, n. 6. Otherwise, respondents make no attempt to show that the decisions cited by petitioners are not in conflict with the decision of the Oklahoma Supreme Court and with other decisions cited by respondents, evidently hoping that the Court will overlook them.

2. Respondents' argument that the decision below does not conflict with this Court's decision in *Dennis v. Higgins*, 498 U.S. 439 (1991) is astonishing. Respondents state:

> While the Court [in *Dennis*] held that such suits [challenging state taxes under the Commerce Clause] *may* be brought [in state courts under § 1983], the Court did not address, and did not decide, whether state courts are *required* to allow such suits, particularly where an adequate remedy exists under state law, independent of and coextensive with the remedy provided by § 1983.

Br. in Opp. at 9 (emphasis in original). The Court's holding in *Dennis* that persons may bring Commerce Clause challenges to state taxes in state courts under § 1983 would certainly appear to require state courts to allow such suits. If state courts could refuse to allow such suits, it is difficult to see what is left of the Court's holding that persons may bring such suits. In any event, whether the Court's decision in *Dennis* is as limited as respondents claim is itself an important question warranting review.

3. Respondents' argument that the decision below does not conflict with *Howlett v. Rose*, 496 U.S. 356 (1990) is also incorrect. Respondents argue that in *Howlett* Florida courts had applied state law "to completely deny the right of action which § 1983 protected", whereas the courts below have applied state law to uphold petitioners' Commerce Clause claims and to grant them the relief they sought. Br. in Opp. at 10. In fact, as this Court noted (496 U.S. at 360, n. 3), the Florida court decisions

in *Howlett* did not decide whether Howlett had a substantive right to relief under state law for the actions complained of. Indeed, this Court noted that the Florida court in which Howlett had filed suit "exercises jurisdiction over [state law] tort claims by private citizens against state entities (including school boards), of the size and type of petitioner's claim here, and it can enter judgment against them." 496 U.S. at 378. What the Florida court of appeals had held in *Howlett* was that state law barred Howlett's *federal* claim for relief under § 1983, and it was that holding that this Court found to be in error. The holding of the Oklahoma Supreme Court denying petitioner's federal claim for relief under § 1983 is in error for the same reasons.

4. More generally, respondents echo the view of the Oklahoma Supreme Court that it is inappropriate to award relief under § 1983 and attorneys' fees under § 1988 in cases where the substantive relief on the underlying claims was available and awarded under state law. Br. in Opp. at 12-13. This Court has rejected that argument in many cases. As the Court stated in *Monroe v. Pape*, 365 U.S. 167, 183 (1961): "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the State remedy, and the latter need not be first sought and refused before the federal one is invoked." *See also Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982). Furthermore, the Court has held that if § 1983 would have been an appropriate basis for relief, the plaintiff is entitled to attorneys' fees under § 1988 even if relief was actually awarded on another ground. *Maher v. Gagne*, 448 U.S. 122, 132 n. 15 (1980).

5. There is also no merit to respondents' characterization of an award of attorneys' fees under § 1988 as an "extra windfall" (Br. in Opp. at 6) and their effort to denigrate the importance of the issue by saying that the case is only about attorneys' fees (*id.* at 5). Section 1988 reflects Congress's determination that when a state entity violates a citizen's federal

rights under color of state law and the citizen is required to take legal action to vindicate those rights, the responsible state entity will be liable for the *full* extent of the costs that its actions impose upon the citizen, including the costs of litigation. Recovery of those costs is in no sense a windfall. As this Court has also recognized in many cases, § 1988 represents an important Congressional policy that is " 'an integral part of the remedies necessary to obtain' compliance with § 1983." *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980)(citation omitted).[2]

Furthermore, the decision below presents fundamental questions about the obligations of state courts to enforce federal law that go far beyond the immediate question of attorneys' fees and §§ 1983 and 1988. Whether the court below correctly answered those questions warrants this Court's review.

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[2] In this connection, respondents are mistaken in asserting: "No damages or relief were sought under § 1983, either in the form of declaratory or injunctive relief, or as refunds." Br. in Opp. at 3, n. 3. Count III of petitioners' complaint contained their allegations under § 1983 and expressly stated: "Defendants are therefore liable to plaintiffs pursuant to 42 U.S.C. § 1983." Furthermore, the Oklahoma Supreme Court itself recognized in its decision that "plaintiffs sought declaratory and injunctive relief, a refund of taxes paid, and an attorneys' fee, under both state law, and § 1983." Pet App. 5a.

Respondents are also mistaken in asserting that "Petitioners here do not challenge [the] conclusion . . . that Oklahoma law provides an adequate state remedy affording the relief the plaintiffs requested." Br. in Opp. at 4. Petitioners certainly do assert that the state remedies are not adequate, because they do not require the recovery of attorneys' fees and other litigation costs that § 1988 requires.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Oklahoma should be granted.

Respectfully submitted,

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